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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, AUGUST 5, 1998

APPLICATION OF

COMMONWEALTH CHESAPEAKE
CORPORATION

CASE NO. PUE960224

For approval of expenditures for new
generation facilities pursuant to Va.
Code § 56-234.3 and for a certificate of
public convenience and necessity
pursuant to Va. Code § 56-265.2

FINAL ORDER

On September 17, 1996, Commonwealth Chesapeake Corporation, predecessor to Commonwealth Chesapeake, L.L.C. (“Commonwealth Chesapeake” or the “Company”) filed an application seeking approval and certification of a proposed generating facility (“Facility”) to be constructed in Accomack County, on the Eastern Shore of Virginia. The Facility would operate as an independent power producer (“IPP”) and sell power at wholesale to utilities operating within the Pennsylvania-New Jersey-Maryland Interconnection (“PJM”). It will be oil-fired and consist of three simple cycle combustion turbines with an aggregate nominal rating of approximately 300 MW.

The Company requests: (i) a certificate of public necessity and convenience (“certificate”) for the Facility pursuant to § 56-265.2 of the Code of Virginia; (ii) approval under § 56-234.3 for the expenditures for the construction of the Facility; (iii) clarification that any entity that lends money, credit or services to the Company is not thereby rendered a utility or

public service company under Virginia law; (iv) a declaration that the granting of a lien or a security interest in the Company's assets does not require Commission approval; and (iv) exemption from Commission jurisdiction under Chapter 1, Article 5; Chapter 3; Chapter 10, Articles 1.1, 2, 2.1, 3 and 4 of Title 56 of the Virginia Code.

Recently, the General Assembly amended § 56-265.2, effective March 13, 1998, to add new subsection B. The new § 56-265.2 B relaxes the standard for the issuance of a certificate authorizing "the construction and operation of electrical generating facilities, which shall not be included in the rate base of any regulated utility whose rates are established pursuant to Chapter 10 (§ 56-232 et seq.) of Title 56" provided certain criteria have been met.¹ In light of the above amendment to § 56-265.2, the Company filed testimony on March 26, 1998, changing its request for a conditional certificate to a non-conditional certificate.

On July 10, 1998, the Hearing Examiner issued his Report. He found that the Facility will meet the requirements of the applicable statutes and recommended that the Commission issue a certificate for Commonwealth Chesapeake's proposed facility. More specifically, the Examiner found that the Facility is subject to the requirements of § 56-265.2 B and meets the criteria of that subsection in that the Facility would: (1) have no material adverse effect on the rates paid by ratepayers in the Commonwealth; (2) have no adverse impact upon the reliability of electric service provided by any Virginia utility; and (3) would not "be otherwise contrary to the public interest."

In considering whether the Facility would not be otherwise contrary to the public interest, the Hearing Examiner found that the public interest involves an analysis of several traditional factors, as well as the effect of a proposed facility on the environment as provided for in § 56-265.2 B and § 56-46.1.² He stated that a determination of the public interest involves, at a

¹ Specifically, § 56-265.2 B provides that the Commission may issue a permit for such a facility if it finds that the generating facility and the associated facilities: (i) will have no material adverse effect upon the rates paid by customers of any regulated public utility in the Commonwealth; (ii) will have no material adverse effect upon reliability of electric service provided by any such regulated public utility; and (iii) are not otherwise contrary to the public interest.

² Section 56-265.2 B requires the Commission, in reviewing a petition for issuance of a certificate under this subsection, to "give consideration to the effect of the facility and associated facilities . . . on the environment and

minimum, consideration of: (i) the environmental impact of the Facility; (ii) the need for the Facility; (iii) the technical and financial viability of the developer and project; (iv) the effect of the Facility on economic development within the Commonwealth; and (v) any improvements in service reliability resulting from the Facility. The Hearing Examiner found that all of the public interest factors, with the exception of the impact of the Facility on the environment, should be weighted positively. He found that, even though the various state and local agencies responsible for issuing the necessary environment permits found that the Facility would create no significant problems,³ the Facility likely will negatively affect the environment since “it is undisputed that NOx emissions from the facility will be over 1,200 tons per year.”⁴ Nonetheless, the Hearing Examiner weighed the several public interest factors and concluded that the benefit from the other public interest factors will sufficiently offset the adverse impact of the Facility on the environment with the result that the Facility is “not otherwise contrary to the public interest.”

The Hearing Examiner recommended that the certificate be granted subject to the following conditions: (i) the Facility must be placed in service within three years of the issuance of the certificate; (ii) the Company must purchase the 100-acre buffer surrounding the plant;⁵ and (iii) the Company must enter into interconnection and purchase power agreements with Delmarva and PJM as required to permit the dispatch of the Facility by PJM, or, alternatively, with ODEC, before placing the plant into service.

The Hearing Examiner also recommended that the Commission grant the Company’s request to be exempted from the provisions of Chapter 10, including § 56-234.3. The Hearing Examiner found that § 56-265.2 B allows the Commission to exempt an IPP from ratemaking

establish such conditions as may be desirable or necessary to minimize adverse environmental impact as provided in § 56-46.1.” Section 56-46.1 requires the Commission to give consideration to the proposed facility’s effect on the environment and to “establish such conditions as may be desirable or necessary to minimize adverse environmental impact.”

³ In particular, the Examiner noted that the Virginia Department of Environmental Quality (“DEQ”) issued a required air permit that was appealed by four citizens to the United States Environmental Protection Agency (“EPA”), and the EPA upheld the DEQ’s award of the permit.

⁴ Hearing Examiner’s Report at 17.

⁵ In its application, the Company stated that it would purchase up to 100 acres of surrounding woodland to provide a visual buffer. Subsequently, the Company suggested that the purpose of the buffer might be accomplished with less than the full 100 acres.

and regulatory requirements of Chapter 10 without limiting the Commission's general regulatory duties and powers. Therefore, he recommended that the Commission grant the requested waiver since the competitive PJM market should provide the public with increased protection against the consequences of an inefficient power producer, but require that the Company be subjected to reporting requirements established in a prior IPP certification case.⁶

Mr. George Bailey filed comments on the Hearing Examiner's Report. He maintains that there is no current need for additional generating facilities on the Eastern Shore, the Facility is not necessary to improve service reliability, and the Commission should not issue a certificate for the Facility. Mr. Bailey reiterates his concern about the impact of the Facility on the environment and requests that, if a certificate is issued for the Facility, the Commission require the use of SCR technology to reduce the NOx impact and eliminate any impact on ground water resources.

Commonwealth Chesapeake also filed comments. It states that it strongly concurs with the Hearing Examiner's analysis and conclusions, with the exception of the Examiner's finding that the Facility will have a negative environmental impact. By way of making a "clarifying observation," the Company argues that the Hearing Examiner's assessment of the evidence concerning the impact of the Facility on the environment is flawed. For example, the Company takes issue with the Examiner's statement that it is undisputed that the Facility will emit 1,200 tons per year of NOx. The Company states that the estimate of 1,200 tons per year contemplates that the Facility will operate 2,000 hours per year and "[n]o one, least of all the Company, expects that this facility will be dispatched as a source of generation for anything approaching that number of hours per year."⁷ Further, the Company points out that the Facility will be a source of peaking power and asserts that most of the time the Facility will be dispatched in lieu

⁶ See Application of Doswell Limited Partnership, For a certificate of public convenience and necessity and, if applicable, for approval of expenditures for new generating facilities, Case No. PUE890068, 1990 SCC Ann. Rept. 297.

⁷ Commonwealth Chesapeake Comments 4.

of older, less efficient plants that produce higher levels of emissions. The Company concludes that “the result necessarily must be lower emission levels than otherwise would be the case.”⁸

In addition, the Company requests what it characterizes as “minor” modifications to two of the conditions recommended by the Examiner. First, the Company states that while it has committed to providing an “absolute visual buffer to ensure that the proposed plant will not be visible from any existing residential or commercial structure,”⁹ it may be able to fulfill this commitment by purchasing something less than the 100 acres for which it has acquired an option to purchase. The Company requests that the condition be expressed “in terms of the desired objective as opposed to the purchase of specified acreage.”¹⁰ Second, it requests that the wording of the Hearing Examiner’s recommendation that the Company be required to enter into interconnection and purchase power agreements with Delmarva and PJM prior to placing the Facility into service be changed to require the Company to become a signatory to the PJM Operating Agreement. The Company states that the purpose of the Examiner’s recommendation can best be attained by its becoming a member of PJM because, in so doing, it will in effect be executing an interconnection agreement with PJM.

NOW THE COMMISSION, upon consideration of the record, the Hearing Examiner’s Report, and the applicable statutes, is of the opinion and finds that the findings and recommendations of the Hearing Examiner are reasonable and should be accepted, as modified herein.

We fully appreciate the public witnesses’ and Protestant Bailey’s concerns about the impact of the Facility on the environment. Nevertheless, we have considered all the facts of this case and find that the Hearing Examiner’s analysis of the statutory requirements and application thereof to the facts of this case is well reasoned. More specifically, we agree with the Hearing Examiner that the applicable statutes require us to consider a number of factors affecting the

⁸ Id. at 3.

⁹ Id. at 6.

¹⁰ Id.

public interest and that the public interest factors should be positively weighted, with the exception of the impact of the Facility on the environment. We also agree with the Hearing Examiner that, on balance, the benefits to the public that will be gained from the Facility will outweigh its adverse impact on the environment. Moreover, as the Company points out, it is unlikely that the plant will operate the allowable 2,000 hours per year, and thus the level of emissions should be proportionately reduced.

The Company's requested modification with respect to the buffer has merit. The Company may be correct in its assertion that an appropriate buffer may require something less than 100 acres. Therefore, we require the Company to promptly propose a specific buffer to the Staff. The proposed buffer must be substantial and constitute the "absolute" visual buffer that the Company has committed to provide.¹¹ More specifically, the Company is directed, after consultation with the Staff, to acquire sufficient acreage to provide a visual buffer to ensure that the plant's combustion turbines, generators, air handling systems, exhaust systems, emissions control systems, power delivery system, control system, fuel storage facilities, fire protection facilities and appurtenances associated with these facilities will not be visible from New Church or any other existing residential or commercial structures. We expect that this buffer will also be beneficial in that it will help facilitate noise abatement in the surrounding areas. We direct the Staff to inform the Commission once an appropriate buffer has been selected and procured. We further direct the Staff to advise the Commission if the Company does not propose a buffer that comports with our directive within a reasonable time.

The second modification requested by the Company concerns the Hearing Examiner's recommendation that the Company be required to enter into interconnection and purchase power agreements with Delmarva and PJM within three years. We find that the Company's request to modify the wording of this condition appears reasonable. We will modify this condition to require the Company to enter into all agreements that are necessary to allow the Company to

¹¹ See Hearing Examiner's Report at 15-16 & n.81.

transmit the electric power produced by the Facility to PJM participants, including the PJM Operating Agreement, or in the alternative, to ODEC, before the Facility is placed into service (i.e., to the end of the sunset provision of the certificate). Accordingly,

IT IS ORDERED THAT:

(1) The findings and recommendations in the Hearing Examiner's July 10, 1998 Report are hereby adopted, with the modifications discussed herein, and the Company shall comply with the directives contained in the findings set out in the Hearing Examiner's Report and in this Order.

(2) This case shall be dismissed and the papers placed in the file for ended causes.